

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 18, 2014

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

Case No. 13-CV-00336 (VEB)

ANNA M. FRIEDLANDER,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

DECISION AND ORDER

I. INTRODUCTION

In January of 2010, Plaintiff Anna M. Friedlander applied for Supplemental Security Income (“SSI”) benefits and Disability Insurance Benefits (“DIB”) under the Social Security Act. The Commissioner of Social Security denied the applications.

1 Plaintiff, represented by the Law Offices of Dana Madsen, Joseph Linehan,
2 Esq., of counsel, commenced this action seeking judicial review of the
3 Commissioner's denial of benefits pursuant to 42 U.S.C. §§ 405 (g) and 1383 (c)(3).
4 The parties consented to the jurisdiction of a United States Magistrate Judge.
5 (Docket No. 8).

6 On May 1, 2014, the Honorable Rosanna Malouf Peterson, Chief United
7 States District Judge, referred this case to the undersigned pursuant to 28 U.S.C. §
8 636(b)(1)(A) and (B). (Docket No. 16).

10 II. BACKGROUND

11 The procedural history may be summarized as follows:

12 On January 12, 2010, Plaintiff applied for SSI benefits and DIB, alleging
13 disability beginning October 21, 2009. (T at 174-85).¹ The applications were denied
14 initially and Plaintiff requested a hearing before an Administrative Law Judge
15 ("ALJ"). On February 21, 2012, a hearing was held before ALJ Caroline Siderius.
16 (T at 58). Plaintiff appeared with her attorney and testified. (T at 69-95, 98). The
17 ALJ also received testimony from Daniel McKinney, a vocational expert (T at 95-
18 102) and John Morse, a medical expert. (T at 63-69).

19 ¹ Citations to ("T") refer to the administrative record at Docket No. 11.

1 On March 12, 2012, ALJ Siderius issued a written decision denying the
2 applications for benefits and finding that Plaintiff was not disabled within the
3 meaning of the Social Security Act. (T at 29-50). The ALJ's decision became the
4 Commissioner's final decision on July 23, 2013, when the Social Security Appeals
5 Council denied Plaintiff's request for review. (T at 1-7).

6 On September 19, 2013, Plaintiff, acting by and through her counsel, timely
7 commenced this action by filing a Complaint in the United States District Court for
8 the Eastern District of Washington. (Docket No. 5). The Commissioner interposed
9 an Answer on November 25, 2013. (Docket No. 10).

10 Plaintiff filed a motion for summary judgment on March 31, 2014. (Docket
11 No. 15). The Commissioner moved for summary judgment on June 10, 2014.
12 (Docket No. 20). Plaintiff filed a reply brief on June 25, 2014. (Docket No. 22).

13 For the reasons set forth below, the Commissioner's motion is denied,
14 Plaintiff's motion is granted, and this case is remanded for further proceedings.
15

16 **III. DISCUSSION**

17 **A. Sequential Evaluation Process**

18 The Social Security Act ("the Act") defines disability as the "inability to
19 engage in any substantial gainful activity by reason of any medically determinable
20

1 physical or mental impairment which can be expected to result in death or which has
2 lasted or can be expected to last for a continuous period of not less than twelve
3 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
4 plaintiff shall be determined to be under a disability only if any impairments are of
5 such severity that a plaintiff is not only unable to do previous work but cannot,
6 considering plaintiff’s age, education and work experiences, engage in any other
7 substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
8 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
9 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

10 The Commissioner has established a five-step sequential evaluation process
11 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
12 one determines if the person is engaged in substantial gainful activities. If so,
13 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
14 decision maker proceeds to step two, which determines whether plaintiff has a
15 medically severe impairment or combination of impairments. 20 C.F.R. §§
16 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

17 If plaintiff does not have a severe impairment or combination of impairments,
18 the disability claim is denied. If the impairment is severe, the evaluation proceeds to
19 the third step, which compares plaintiff’s impairment with a number of listed

1 impairments acknowledged by the Commissioner to be so severe as to preclude
2 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20
3 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed
4 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is
5 not one conclusively presumed to be disabling, the evaluation proceeds to the fourth
6 step, which determines whether the impairment prevents plaintiff from performing
7 work which was performed in the past. If a plaintiff is able to perform previous work
8 that plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
9 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) is
10 considered. If plaintiff cannot perform past relevant work, the fifth and final step in
11 the process determines whether plaintiff is able to perform other work in the national
12 economy in view of plaintiff's residual functional capacity, age, education and past
13 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*
14 *Yuckert*, 482 U.S. 137 (1987).

15 The initial burden of proof rests upon plaintiff to establish a *prima facie* case
16 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
17 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
18 met once plaintiff establishes that a mental or physical impairment prevents the
19 performance of previous work. The burden then shifts, at step five, to the

1 Commissioner to show that (1) plaintiff can perform other substantial gainful
2 activity and (2) a “significant number of jobs exist in the national economy” that
3 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

4 **B. Standard of Review**

5 Congress has provided a limited scope of judicial review of a Commissioner’s
6 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner’s decision,
7 made through an ALJ, when the determination is not based on legal error and is
8 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir.
9 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). “The [Commissioner’s]
10 determination that a plaintiff is not disabled will be upheld if the findings of fact are
11 supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir.
12 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,
13 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9th Cir. 1975), but less than a
14 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9th Cir. 1989).
15 Substantial evidence “means such evidence as a reasonable mind might accept as
16 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401
17 (1971)(citations omitted). “[S]uch inferences and conclusions as the [Commissioner]
18 may reasonably draw from the evidence” will also be upheld. *Mark v. Celebreeze*,
19 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a

1 whole, not just the evidence supporting the decision of the Commissioner. *Weetman*
2 *v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,
3 526 (9th Cir. 1980)).

4 It is the role of the Commissioner, not this Court, to resolve conflicts in
5 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
6 interpretation, the Court may not substitute its judgment for that of the
7 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
8 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
9 set aside if the proper legal standards were not applied in weighing the evidence and
10 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d
11 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
12 administrative findings, or if there is conflicting evidence that will support a finding
13 of either disability or nondisability, the finding of the Commissioner is conclusive.
14 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

15 **C. Commissioner's Decision**

16 The ALJ found that Plaintiff had not engaged in substantial gainful activity
17 since October 21, 2009, the alleged onset date, and met the insured status
18 requirements of the Social Security Act through September 30, 2013. (T at 34). The
19 ALJ determined that Plaintiff's fibromyalgia, degenerative joint disease, depression,

1 mild osteoarthritis, morbid obesity, and gastritis were impairments considered
2 “severe” under the Act. (Tr. 35-36).

3 However, the ALJ concluded that Plaintiff did not have an impairment or
4 combination of impairments that met or medically equaled one of the impairments
5 set forth in the Listings. (T at 36-37). The ALJ determined that Plaintiff retained the
6 residual functional capacity (“RFC”) to perform light work, as defined in 20 CFR §
7 416.967 (b), except that she was limited to occasional pushing or pulling with her
8 lower extremities, should avoid climbing ladders, ropes, or scaffold, and was limited
9 to occasional climbing stairs, climbing ramps, balancing, stooping, crawling,
10 kneeling, and crouching. (T at 37). The ALJ concluded that Plaintiff needed to
11 avoid concentrated exposure to temperatures, wetness, vibrations, and the operation
12 of heavy machinery. In addition, she could not work at unprotected heights and was
13 limited to a maximum of three-step tasks. (T at 37).

14 The ALJ concluded that Plaintiff could not perform her past relevant work. (T
15 at 43). However, considering Plaintiff’s age (46 on the alleged onset date),
16 education (limited), work experience, and RFC (light work, with non-exertional
17 limitations outlined above), the ALJ concluded that there were jobs that exist in
18 significant numbers in the national economy that Plaintiff can perform. (T at 43-44).

1 As such, the ALJ concluded that Plaintiff was not disabled, as defined under
2 the Act, between October 21, 2009 (the alleged onset date) and March 12, 2012 (the
3 date of the ALJ's decision) and was therefore not entitled to benefits. (Tr. 44-45).
4 As noted above, the ALJ's decision became the Commissioner's final decision when
5 the Appeals Council denied Plaintiff's request for review. (Tr. 1-7).

7 IV. ANALYSIS

8 The ALJ found that Plaintiff's medically determinable impairments could
9 reasonably be expected to cause the alleged symptoms, but concluded that her
10 statements concerning the intensity, persistence, and limiting effects of the
11 symptoms were not entirely credible. (T at 40). For the following reasons, this
12 Court finds the ALJ's decision flawed and concludes that a remand is required.

13 The ALJ noted Plaintiff's history of substance abuse (in particular, cocaine
14 abuse) (T at 400, 494) and concluded that there was "a question of whether
15 substance abuse or dependence is a contributing factor in her allegations of total
16 disability" (T at 38). The ALJ then used the issue of substance abuse to
17 discount Plaintiff's credibility. (T at 38). However, this was not the proper
18 procedure for addressing substance abuse in the Social Security disability context.

1 When a Social Security disability claim involves substance abuse, the ALJ
2 must first conduct the general five-step sequential evaluation without determining
3 the impact of substance abuse on the claimant. If the ALJ finds that the claimant is
4 not disabled, then the ALJ proceeds no further. If, however, the ALJ finds that the
5 claimant is disabled, then the ALJ conducts the sequential evaluation and second
6 time and considers whether the claimant would still be disabled absent the substance
7 abuse. *See Bustamente v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001), 20 CFR §§
8 404.1535, 416.935.

9 Here, the ALJ did not follow this process and thus deviated from the
10 applicable legal requirements. Curiously, the ALJ cited the applicable Regulations
11 (T at 38), but did not actually conduct the analysis required thereunder. Although
12 Plaintiff bears the burden of proving that her drug use is not a contributing factor
13 material to the disability determination, the ALJ was obliged to develop the record
14 and resolve the issue one way or the other. *See Gibson v. Astrue*, No. CV 06-3003,
15 2008 U.S. Dist. LEXIS 26962, at *5-6 (D. Ariz. Mar. 31, 2008). Indeed, some
16 courts have concluded that if the ALJ cannot resolve the question of whether
17 substance abuse is a contributing factor, the claimant has met her burden and an
18 award of benefits should follow. *See, e.g. Outin v. Astrue*, No. C 10-1764, 2011 U.S.

1 Dist. LEXIS 87958, at *15 (N.D.Ca Aug. 9, 2011); *Brueggemann v. Barnhart*, 348
2 F.3d 689, 693-95 (8th Cir. 2003).

3 An ALJ errs where, as here, she considers the claimant's substance abuse in
4 her analysis without conducting the two-step process outlined in 20 CFR § 404.1535
5 and § 416.935. *See Reid v. Astrue*, No. 08-5249, 2009 U.S. Dist. LEXIS 119858, at
6 *22-26 (N.D. Ca. Dec. 23, 2009)("While the record contains ample evidence that
7 Reid has a history of substance use, the ALJ did not explain, nor cite evidence
8 indicating, how and to what extent Reid's substance abuse contributed to his
9 disability status."). Accordingly, because the ALJ did not follow the applicable
10 legal standard, this Court cannot determine whether substantial evidence supports
11 her determination. *Id.* at *26. A remand is therefore required.

12 In a case where the ALJ's determination is not supported by substantial
13 evidence or is tainted by legal error, the court may remand the matter either for
14 additional proceedings or an immediate award of benefits. Remand for additional
15 proceedings is proper where (1) outstanding issues must be resolved, and (2) it is not
16 clear from the record before the court that the claimant is disabled. *See Benecke v.*
17 *Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004).

1 Here, the outstanding issue of Plaintiff's substance abuse must be resolved for
2 the reasons outlined above. In addition, it is not clear from the record before this
3 Court whether Plaintiff is disabled.

4 In November of 2010, Karen Severns, a social worker, provided an
5 assessment of Plaintiff's mental health limitations. Ms. Severns had, at that time,
6 been providing psychological counseling to Plaintiff for two months. She diagnosed
7 post-traumatic stress disorder (delayed onset), major depression (recurrent, severe),
8 anxiety disorder NOS, and dysthmic disorder. (T at 443). Ms. Severns assigned a
9 Global Assessment of Functioning ("GAF")² score of 34 (T at 443), which
10 "indicates some impairment in reality testing or communication (e.g., speech is at
11 times illogical, obscure, or irrelevant) or major impairment in several areas such as
12 work or school, family relations, judgment, thinking or mood." *Tagin v. Astrue*, No.
13 11-cv-05120, 2011 U.S. Dist. LEXIS 136237 at *8 n.1 (W.D.Wa. Nov. 28,
14 2011)(citations omitted).

15 However, the ALJ noted that the contemporaneous treatment notes did not
16 provide much support for Ms. Severns's assessment. (T at 40-41). Dr. John Morse,
17 a medical expert, testified that Plaintiff could occasionally lift 20 pounds and

18 ² "A GAF score is a rough estimate of an individual's psychological, social, and occupational
19 functioning used to reflect the individual's need for treatment." *Vargas v. Lambert*, 159 F.3d 1161,
20 1164 n.2 (9th Cir. 1998).

1 frequently lift 10 pounds, stand/walk for 6 hours in an 8-hour workday, and sit for 6
2 hours in an 8-hour workday. (T at 66). He found no push/pull limitations, modest
3 postural and environmental limitations, and no manipulative, visual, or
4 communicative limitations. (T at 66).

5 Dr. Sharon Underwood, a non-examining State Agency psychiatric review
6 consultant, assessed mild restriction as to Plaintiff's activities of daily living, mild
7 difficulties in maintaining social functioning, and moderate difficulties in
8 maintaining concentration, persistence, or pace. (T at 456). She opined that Plaintiff
9 could perform simple work and detailed tasks (if she was familiar with it). (T at
10 462). Dr. Underwood also concluded that Plaintiff could adjust to simple changes in
11 the workplace, set goals independently, avoid hazards, and travel. (T at 462).

12 There is thus conflicting evidence concerning the extent of Plaintiff's
13 limitations and, as noted above, inadequate analysis by the ALJ concerning the
14 substance abuse issue. Accordingly, a remand for further proceedings is the
15 appropriate remedy.

16 V. ORDERS

17 **IT IS THEREFORE ORDERED** that:

18 Plaintiff's motion for summary judgment, **Docket No. 15**, is **GRANTED**.

1 The Commissioner's motion for summary judgment, **Docket No. 20**, is
2 **DENIED**.

3 This case is **REMANDED** to the Commissioner for further proceedings
4 consistent with this Decision and Order.

5 The District Court Executive is directed to file this Order, provide copies to
6 counsel, enter judgment in favor of the Plaintiff, and keep the case open for a period
7 of sixty (60) days to allow Plaintiff's counsel an opportunity to submit an
8 application for attorneys' fees.

9 DATED this 18th day of August, 2014.

10
11 /s/Victor E. Bianchini
12 VICTOR E. BIANCHINI
13 UNITED STATES MAGISTRATE JUDGE
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